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DETERMINED BY

THE HIGH COURTS

AND BY

THE FEDERAL COURT

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AMANULLAH v. NAZIR AHMAD

[A.C.J. (Ibrahim J.) October 11, 1968]
[K.L. — Civil Appeal No. 17 of 1967]

Practice and Procedure — Attachment — Application for, before judgment — Delay in execution of order — Application to set aside — Debtors Ordinance, 1957, s. 19(1)(c).

In this case the respondent had brought an action for recovery of $1,200 lent by him to the appellant. He then obtained an order for attachment before judgment of the appellant's property. But it was only about 4 months and 20 days later that he took steps to execute the order; the appellant thereupon protested and after paying the sum of $1,400 in court, applied for refund of the money.

Held, allowing the appeal: (1) the delay of the respondent in executing the order showed that he could not have genuinely believed that the appellant was going to transfer his property to his brother in Singapore and therefore the learned president was wrong in finding that the second requirement for section 19(1)(c) of the Debtors Ordinance "that the defendant with intent to obstruct or delay execution of any judgment has removed or is about to remove or has concealed or is concealing or making away with or handing over to others, any of his movable or immovable property", had been complied with;

(2) the order of attachment must therefore be set aside and the money deposited in court returned to the appellant.

Cases referred to:—

(1) *Kepong Prospecting Ltd.* v. *Schmidt* [1962] M.L.J. 375.

(2) *Ing Chiat* v. *A.B. Nicholas* [1934] M.L.J. 251; [1933-34] F.M.S.L.R. 306.

(3) *Ex parte Lamb, In re Southam* (1881-2), 19 Ch. D. 173.

MAGISTRATE'S CIVIL APPEAL.

K.S. Nathan for the appellant.

Berny Johns for the respondent.

Cur. Adv. Vult.

Ibrahim J.: On 6th November 1965 the plaintiff (respondent) brought an action in the Sessions Court, Kuala Lumpur, against the defendant (appellant) claiming the sum of $1,200 being the balance of a friendly loan given by him to the defendant. Four days later i.e. on 10th November 1965 the plaintiff made an application supported by affidavit and obtained an order from the learned president for attachment before judgment of the defendant's property.

It was not until 31st March 1966 i.e. about 4 months and 20 days later, however, that the bailiff, accompanied by the plaintiff proceeded to execute the order at the defendant's shop. The defendant protested against the execution of the order and in the event he deposited $1,400 in court which sum included $200 estimated costs to avoid the execution of the order. On 7th April 1966 the defendant made an application supported by affidavit for refund of the $1,400 deposited and for compensation. At the hearing of the application both the defendant and the plaintiff gave evidence and on 30th September 1966 the learned president dismissed the application with costs. This is an appeal by the defendant against that decision of the learned president.

The application for attachment before judgment was made under section 19(1)(c) of of the Debtors Ordinance (No. 71 of 1957) the essential requirements of which had been stated by Thomson C.J. (as he then was) in *Kepong Prospecting Ltd.* v. *Schmidt* [1] at page 377 as follows:—

> "From the wording of the section it is clear that the applicant for such an order must satisfy the court by evidence on oath of two things. The first is that he has a 'good cause of action'. The second is that the defendant 'with intent to obstruct or delay execution of any judgment' has removed, or is about to remove, or has concealed, or is concealing, or making away with, or handing over to others, any of his movable or immovable property."

The learned president found that both the requirements of the said section 19(1)(c) had been complied with and the grounds of appeal are mostly directed against that finding of the learned president. It was also submitted that the delay in the execution of the order had nullified it.

In paragraph 2 of his affidavit in support of his application dated 10th November 1965 the plaintiff had stated that he had a just cause of action and as neither in his affidavit in support of his application dated 7th April 1966 nor in the evidence he gave at the hearing of the application did the defendant raise the issue of whether there was a good cause of action or not, I see no reason why I should interfere with the learned president's finding that the first requirement of section 19(1)(c) had been complied with.

With regard to the second requirement of section 19(1)(c) paragraph 3 of the plaintiff's affidavit in support of his application dated 10th November 1965 reads as follows:—

"3. The defendant told me that he was going to transfer all his properties into the brother's name and and would be going to Singapore to settle down there where he will be running a provision shop."

It was submitted that paragraph 3 of the plaintiff's affidavit was vague and groundless in its terms and that on the authority of *Ing Chiat* v. *A.B. Nicholas*,[2] the order should not have been made. It was also submitted that the president's decision was against the weight of evidence. In *Ing Chiat's* case the relevant part of the affidavit read as follows:—

"I understand that the manager of the Rinchang estate, Semenyeh, has given notice to the defendant to terminate his service at the end of this month. I have learnt from reliable source that the defendant is about to leave the jurisdiction of this court to return to Penang without settling the money due to me and I believe the same to be true as the defendant came from Penang".

And Thomas C.J. said:—

"Such an affidavit is vague in its terms and a magistrate should not make an order even if it were not contested, without requiring the deponent to state his means of knowledge. Presumably it would be preferrable that the persons having a knowledge of the matters should themselves make affidavits".

As in the present case paragraph 3 of the affidavit shows that it was the defendant himself and not some other persons as in *Ing Chiat's* case who told him that he was going to transfer his property to his brother. The learned president, with paragraph 3 of the plaintiff's affidavit as the only evidence on oath before him then, may well be justified in finding that section 19(1)(c) had been complied with and thereby to issue the order.

Further evidence on oath, however, was adduced on this matter. Both in his affidavit in support of the application and in his evidence at the hearing of that application the defendant denied that he ever told the plaintiff that he was going to transfer his property to his brother or to settle down permanently in Singapore or that he had any such intentions. He however admitted that he had a brother and that he used to travel to Singapore where he had a shop. The plaintiff in his evidence repeated what he had alleged in paragraph 3 of his affidavit and said that he believed what the defendant told him. He also said that the defendant's father and employee also told him about it. He admitted that he did not make any enquiries from any other source to substantiate his allegation. The learned president found that, as the defendant himself had admitted that he had a shop in Singapore and that he had a brother, the plaintiff's fear that the defendant was going to transfer his property to his brother was not groundless.

In my opinion the president's finding is against the weight of all the evidence before him. He had not sufficiently appreciated the significance of the delay in the execution of the order and the plaintiff's explanation for it which is as follows:—

"I waited for about 5 months before attachment. It was all on promises made by applicant and applicant's father. Applicant and his father asked me to hold on and it was better to be patient".

Earlier on he said:—

"I delayed attachment pending settlement".

Section 19(1)(c) provides that the order be executed "forthwith". "Forthwith" ordinarily means immediately or without delay and in *Ex parte Lamb, In re Southam* [2] at page 173 Jessel M.R. said:—

"Where an act which is required to be done 'forthwith' can be done without delay, it ought to be done".

The object of section 19(1)(c) is to ensure that the plaintiff would get the fruit of any judgment that he may subsequently obtain and this can only be achieved by seizing "forthwith" the defendant's property which it was alleged he was going to transfer to his brother. The order for attachment is not intended to be used as an instrument to enable the plaintiff to put an unfair pressure on the defendant to settle the claim which the plaintiff admitted he was doing in this case. The plaintiff's explanation for the delay clearly shows that he could not have genuinely believed that the defendant was going to transfer his property to his brother. After considering all the evidence and the circumstances of this case I am of the opinion that the learned president was wrong in finding that the second requirement of section 19(1)(c) had been complied with.

I therefore allow the appeal with costs here and in the court below. The order of attachment dated 10th November 1965 is set aside and the sum of $1,400 deposited is to be returned to the defendant.

As to the appeal in respect of the compensation at page 21 of the appeal record it is noted that the defendant's counsel, in the course of his submission had stated:—

"I abandon claim for damages for wrongful attachment, if court finds attachment wrongful".

The defendant's counsel had filed an affidavit that he had not made such a statement and that what he actually said was that in the event of the court finding that the attachment was proper the claim for damages did not arise. Insofar as the learned president was concerned the claim for compensation had not arisen at all as he had found that the attachment was proper. Yet in his grounds of judgment he saw it fit to refer to the alleged abandonment of that claim and this clearly indicates that he was sure that the defendant's counsel had made that statement. I would therefore not make any award on that claim.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Morris Edgar & Co.*

ANG HOI YIN v. SIM SIE HAU

[O.C.J. (Lee Hun Hoe J.) November 25, 1968]
[Kota Kinabalu — Civil Suit No. 200 of 1968]

Practice and Procedure — Suit commenced by administratrix before extraction of grant of letters of administration — Competency — R.S.C. 1957, O. 16 r. 8 — Probate and Administration Ordinance (Sabah Cap. 109), s. 78.

Executors and Administrators — Administratrix — Grant of letters of administration not extracted — No qualifying status.

In this case letters of administration had been granted to the plaintiff in the estates of *S.C.K.* and *S.K.M.* but it had not been extracted. The plaintiff in her capacity as administratrix brought an action against the defendant. The defendant entered conditional appearance and applied to the court to set aside the writ for want of qualifying status on the part of the plaintiff.

Held: as the plaintiff had not extracted the grant of letters of administration, she had no power to sue as administratrix and therefore the suit was a nullity and must be set aside.

Cases referred to:—

(1) *Comptroller of Income Tax* v. *Yan Tai Min* [1965] 1 M.L.J. 255.

(2) *P. Govindasamy Pillay & Sons* v. *Lok Seng Chai & Ors.* [1961] M.L.J. 89 at p. 91.

(3) *Ingall* v. *Moran* [1944] 1 K.B. 160; [1944] 1 All E.R. 97.

(4) *Chia Faon Sian & Anor.* v. *Lam Chew Fah & Anor.* [1955] M.L.J. 185.

(5) *Re Haji Mohamed Amin* Perak Administration Petition No. 94 of 1934 (unreported).

(6) *Chia Teck Liang* v. *Tan Soo Khiang* [1936] M.L.J. 185.

CIVIL SUIT.

Michael K.M. Yong for the plaintiff.

Shelley Yap Yeok Siew for the defendant.

Cur. Adv. Vult.

Lee Hun Hoe J.: Having entered conditional appearance on 5th October, 1968 the defendant filed a notice of motion on 10th October, 1968 and moved the court to set aside the writ of summons for want of qualifying status on the part of the plaintiff.

In 1949 Sim Joo Mui was appointed administrator of the estates of Sim Chu Kwang and Sim Kia Mui under the Administration of Native and Small Estates Ordinance. He was the younger brother of Sim Kia Mui who died in Tawau in 1942 and he was the uncle of Sim Chu Kwang who died in China in 1937. The two estates seem to be tied up with the firm of Chop Peng Hong Company of Tawau. Many beneficiaries are interested in the two estates. Sim Joo Mui died on 4th September, 1963 without distributing the estates which by affluxion of time have enhanced in value.

The plaintiff applied for letters of administration *de bonis non* in respect of the estate of Sim Kia Mui under petition No. 53 of 1964 and of the estate of Sim Chu Kwang under petition No. 43 of 1966. In each of these petitions Seah Ah Puah *alias* Seah Hwa Joo entered a caveat. The matters thus become contentious. On 9th March, 1966 when both petitions came before Silke J. it was ordered that pleadings be delivered and proceed as an action under rule 19(2)(c) of the Probate and Administration Rules. This produced two suits, namely, Civil Suit No. 81 of 1966 and Civil Suit No. 82 of 1966. On 16th September, 1966, Silke J. dealing with a notice of motion in respect of Civil Suit No 82 of 1966, made an order that Administrator-General, Sabah be appointed receiver in the said proceedings. On 23rd February, 1968 certain applications came before Harley J. in chambers and he made an order. The terms of the order reads:—

"UPON READING the summons in chambers dated the 7th February 1968 and the supporting affidavit of ANG HOI YIN (f) dated 4th October 1967, filed herein AND UPON HEARING STEPHEN YONG and MICHAEL YONG advocates for the applicant, ANG HOI YIN (f) and SHELLY YAP advocate for the defendant SEAH AH PUAH (f) alias SEAH AH JOO (f) IT IS ORDERED that the Order made by the Honourable Mr. Justice Silke on the 16th September 1966 appointing the Administrator-General as receiver be discharged and that the money collected by him as receiver be paid into